Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-19

UNITED STATES OF AMERICA, *Petitioner*

v.

DOMINGA SANTANA, *Respondent*

and

WILLIAM ALEJANDRO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court should review matters not raised or passed upon in the courts below.

II. If so, whether exigent circumstances must exist in order to make a warrantless entry into a residence for the purpose of arresting a suspect.

COUNTER-STATEMENT OF THE CASE

The respondent was arrested by officers of the Philadelphia Police Department inside her residence at 2311 North Fifth Street, Philadelphia, Pennsylvania. At all times relevant to the consideration of the issues raised herein, respondent SANTANA was inside her residence. The residence can be described as a brick row home with one front doorway and a vestibule immediately inside the front doorway as the residence is entered.

Upon receiving information from Patricia McCafferty that she had purchased drugs from "Mom" SANTANA (TR 13-15) the officers proceeded to the above-described location where respondent was allegedly observed in the front doorway. The officers identified themselves at the front of the house by announcing "Police", (TR 68, 74-75, 80, 84, 102), but did not state their purpose to respondent prior to their entry into the residence and the arrest of respondent.[1] Another officer entered the residence through a rear door. (TR 68). Although the petition states that the police announced their "identity and purpose" (Petition, p. 10), this misstatement finds no support in the record. When the police arrived outside of respondent's residence in their vehicle, they alighted with guns drawn and identification cards in hand. At this time the respondent turned and *walked* toward the interior of the house (TR 68) with her back to the approaching officers. Although petitioner chooses to characterize respondent's action in turning and walking away from the front door as an attempt to retreat (Petition, p. 4) or "evade arrest" (Petition, p. 11), nothing in the record supports the conclusion that respondent had knowledge the police sought to arrest her, and that she knowingly attempted to avoid arrest and the trial court so found. On the contrary, it is petitioner's position that one

1. At the suppression hearing, the testimony was conflicting as to whether the mission was to arrest Santana or to search for bait money. (App. A, p. 3a).

objective of the prompt action taken here was to minimize the possibility that respondent would learn she was sought by the police. If that objective was indeed reasonable, it would be equally reasonable to infer that respondent had no idea what the purpose of the police might have been when they alighted from their vehicle.

REASONS FOR DENYING THE WRIT

1. This Court should review only those matters raised or passed upon in the courts below. The contention raised now, that a warrant is not necessary to arrest a person in her residence even though exigent circumstances have not been established, was not raised previously.

In argument before both the trial court and Court of Appeals, petitioner contended that a warrant is necessary in order to make an arrest of a person in her residence, absent exigent circumstances. Petitioner, in its brief in the Court of Appeals (p. 9), stated:

> "The narrow question before this court is whether, under all the circumstances of this case, the arrest of the defendants without a warrant was reasonable. The answer to this would seem to turn on whether or not sufficient exigent circumstances existed at the time of the defendant's arrest so that the officers could properly forego procuring an arrest warrant."

The Court of Appeals appears to have understood the above to be the issue presented for decision because its judgment (App. B, p. 7a), explicitly states the contention of petitioner which it considered.

Petitioner also argued below that exigent circumstances existed at the time of respondent's arrest which justified the absence of a warrant. In addition to the usual catalogue of circumstances offered by the prosecution to justify a warrantless arrest or search, the petitioner argued that the mere circumstance that this arrest was for a crime involving narcotics in and of itself excused the constitutional requirement that a warrant be obtained to enter a residence to make an arrest. Thus petitioner embarks in the opposite direction in this court from the course which it took below.

Compelling reasons exist which would justify this Court's refusal to review the issues raised here for the first time. First, this Court has held on numerous occasions that its review of decisions will generally be restricted to matters raised and passed upon below. *Wood v. Strickland*, — U.S. —, 95 S.Ct. 992 at 1003; *Rugendorf v. United States*, 376 U.S. 528; *Wiener v. United States*, 357 U.S. 349 at 351.

Second, no extraordinary reason has been offered which would merit an exception to the general rule. Although petitioner contends that *United States v. Watson*, *cert. granted*, 420 U.S. 924, presents a similar issue to that raised by the facts of the instant case and supports its contention by arguing that in both cases *the officers* were in a public place, in reality the cases are completely dissimilar because the relevant inquiry does not concern itself with where the police officers were or from where they made their observation of the arrestees. The more relevant consideration is where the arrestees were at the time of their respective arrests. While Watson was arrested in a public place, a restaurant, respondent in this case was arrested inside her home.

The third reason for not granting certiorari is the salutary effect on the criminal justice system of encouraging the parties to raise their arguments at the earliest opportunity. Granting review on the issues now raised for the first time removes the professional necessity for diligent preparation, penalizes the opposing party, denies the trial court an opportunity to correct the error alleged to have occurred, erodes the finality of the trial court and Court of Appeals' rulings, encourages unnecessary and frivolous appeals and needlessly discourages alert representation. This Court should not be required to expend time and energy where no trial court and Court of Appeals rulings have been made. In addition, this Court should be free to more expeditiously dispose of issues which are properly preserved for appeal. Finally, by not granting review in this case, the court will remove the advantage enjoyed by the unprepared trial lawyer who looks to the appellate court to compensate for his trial omissions.

2. Exigent circumstances must exist in order to make a warrantless entry into a residence for the purpose of arresting a suspected felon.

The Fourth Amendment proclaims:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This provision protects and safeguards all citizens against unwarranted intrusions by police and other government officials. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. *Agnello v. United States*, 269 U.S. 20.

> "The requirement of a warrant, as now generally understood, rests primarily on the conception that it is for a judicial officer, and not the prosecution or police, to determine whether the security of our society, which is essential to the maintenance of a rule of law, requires that the right of privacy yield to a right of entry, search and seizure, and what limitation and specification of entry may be appropriate and reasonable." *Dorman v. United States*, 435 F.2d 385, 389 (C.A.D.C.).

This Court has recognized the increasing importance of the need for warrants. *Chimel v. California*, 395 U.S. 752, restricted the scope of a search of premises that was permissible without a warrant to the area immediately within the control of the suspect which might yield dangerous instrumentalities or aid in escape. In *Camara v. Municipal Court*, 387 U.S. 523, this Court held that searches incident to administrative inspections are subject

to the warrant requirement, reversing its previously held position.

The basic principle of the Fourth Amendment that assures the right of privacy and security of the home is applicable not only in the case of entry to search for property, but also to effect an arrest of a suspected felon. Certainly the warrant requirement may be exercised where circumstances exist which do not tolerate delay, but that is not the situation in the instant case. Although petitioner argues that "considerable risk" (Brief, p. 8) existed that respondents would learn of McCafferty's arrest and thus flee or destroy evidence, all of the evidence is to the contrary, as the trial court stated. The arresting officers were in plainclothes inside an unmarked vehicle away from the residence of SANTANA when McCafferty was arrested. How news of her arrest could reach respondents before the police could obtain a warrant is not explained by petitioner, nor does it necessarily follow that if respondents learned of her arrest they would flee or destroy evidence.

This Court has stated that "in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." *Terry v. Ohio*, 392 U.S. 1. *Warden v. Hayden*, 387 U.S. 294, focused on the exigency surrounding danger of an armed robber at large, not explicitly on the "hot pursuit" formulation in excusing the warrant requirement:

> "They [the police] acted reasonably when they entered the house and began to search for a man of the description they had been given *and for weapons* which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so *would gravely endanger their lives or the lives of others*. Speed here was essential, and only a thorough search of the house for persons and weapons would have insured that Hayden was the only man present and *that the police had control of all weapons* which could be used against them or to effect an escape." *Id.*, pp. 298-299 (emphasis added).

The exigency which the majority explicitly relied on in *Hayden* was not "hot pursuit" but the danger of an armed robber to police and the public. No weapons or physical danger are present in this case. In any event, characterizing the action of SANTANA in turning and walking from her doorway (TR. 68) into the interior of her residence as a retreat to "evade arrest" (Brief, p. 11), requiring "hot pursuit" is to distort those terms beyond recognition. A suspect cannot be deemed to be avoiding arrest unless it appears on the record she knew that the purpose of the police was to arrest her. Nowhere in the record does it appear that the police announced their purpose. The action of a person *walking* away is not consistent with an intention to flee and certainly does not present a "hot pursuit" situation. The trial court found that "[T]here was no evidence that either defendant made an effort to flee." (App. A, p. 4a).

In *Coolidge v. New Hampshire*, 403 U.S. 443, the plurality opinion, joined by Justice Harlan, described *Hayden, supra*, as standing for the proposition that "an arrest warrant is required in the absence of exigent circumstances." *Id.*, at 481.

Both the trial court and Court of Appeals found that no exigent circumstances existed to justify the warrantless entry of respondent's residence to arrest her. (App. A; App. B). These findings resulted from a balancing process between the individual's right of privacy and security in her home and the need for effective law enforcement.

The trial court found that "there is no evidence that either defendant was armed," (App. A, p. 4a), "no evidence that there was a need to prevent the escape of either defendant," (App. A, p. 4a), "no evidence that either defendant made an effort to flee." (App. A, p. 4a). On the contrary "the move by defendant SANTANA into the house was a natural response of a person standing in a doorway under the circumstances that faced her when the police officers ran up the steps as opposed to an effort to escape." (App. A, p. 4a). Likewise, the court found "no basis to conclude that

[evidence] was to be destroyed," (App. A, p. 4a), and that under the circumstances "a warrant could have been obtained for either a search or an arrest." (App. A, p. 5a).

CONCLUSION

For the above reasons, respondent prays this Court to deny the petition for writ of certiorari. The issues raised here were not raised in the courts below. The facts in this case are not comparable to those in *United States v. Watson, cert. granted*, 420 U.S. 924 and this case is not a "logical counterpart" (Brief, p. 12) to *Watson*.

Respectfully submitted,

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